Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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80-1495

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1980

No. .....

State of California,

Petitioner

vs.

Robert Stanley Austin,

Respondent

Petition For Writ of Certiorari
To The Appellate Department
Of The Superior Court
For the County of Los Angeles,
California

John A. Vander Lans
City Prosecutor

Robert R. Recknagel
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QUESTIONS PRESENTED

They remain the same as those contained in Appendix "A", pp. 4-7.

We emphasize the present opportunity for this Court to clarify the central confusion surrounding *Faretta*: Is *pro se* status the "natural state of the accused", or does it remain *Gideon's* traditional representation by counsel?

Further, a definitive pronouncement that *Faretta's* record requirements are limited to non-plea, adversary evidentiary settings (trial, evidentiary motions, etc.) and not to be confused with *Boykin's* pure *plea* record requirements would stop confusion among the states as to the relation between *Boykin* and *Faretta* in making constitutionally adequate state court records.

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California

The Long Beach Prosecutor, on behalf of the State of California, prays that a writ of certiorari issue to review the judgment of the Appellate Department of the Superior Court, Los Angeles County, California, entered December 30, 1980.

OPINIONS BELOW

The opinion of the Appellate Department of the Superior Court, Los Angeles County, California, is unreported. We append it herewith as Appendix "C".

The federal constitutional issues to be reviewed were raised in our earlier Petition for Certiorari, No. 79-1041, filed January 4, 1980, and appended herewith *in toto* as Appendix "A".

The order of this Court granting certiorari, April 14, 1980, vacating and remanding is appended herewith as Appendix "B".

The order of the Appellate Department denying certification to any higher California appellate court (Rule 63, California Rules of Court) is appended herewith as Appendix "D".

No California case has overruled *People v. Torres* (1979) 96 Cal.App.3d 14 (157 Cal.Rptr.560), which, like the instant case, was based on pure *Faretta* Sixth Amendment construction.

JURISDICTION

The judgment of the Appellate Department of the Superior Court, Los Angeles County, California was made and entered December 16, 1980. cf. Appendix "C".

Our request for certification of the instant decision to the California Court of Appeal was made and denied December 30, 1980 cf. Appendix "D".

The instant Petition is filed within 60 days thereof.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

They remain the same as those contained in Appendix "A", pp. 4-7.

We emphasize the present opportunity for this Court to clarify the central confusion surrounding *Faretta*: Is *pro se* status the "natural state of the accused", or does it remain *Gideon's* traditional representation by counsel?

Further, a definitive pronouncement that *Faretta's* record requirements are limited to non-plea, adversary evidentiary settings (trial, evidentiary motions, etc.) and not to be confused with *Boykin's* pure *plea* record requirements would stop confusion among the states as to the relation between *Boykin* and *Faretta* in making constitutionally adequate state court records.

CONSTITUTIONAL PROVISIONS INVOLVED

They remain those of Appendix "A". We note that this Court's earlier summary vacation and remand of the erstwhile judgment (cf. Appendix "B") and the resultant new judgment specifying *both* federal and state constitutional law to be the basis for their judgment (*cf.* Appendix "C") has

resolved all ambiguity regarding our clearly federal constitutional issues herein. *Kedroff v. St.Nicholas Cathedral*, 344 U.S. 94, 97.

STATEMENT

The facts and issues are unchanged from Appendix "A".

REASONS FOR GRANTING THE WRIT

The seven reasons of Appendix "A" remain valid.

Most recent *Faretta* pronouncements by state courts continue to present a bewildering array of both substantive and procedural conflicts. There is state conflict on such *Faretta* implications as (1) the right to defendant's presence at trial; (2) whether mental incompetence to stand trial is a standard severable from competence to waive counsel, and (3) its corollary, the right of the court to raise *sua sponte* over defense objection a NGI (not guilty by reason of insanity) plea or diminished-capacity defense; (4) full retroactivity of *Faretta*

(the Michigan Supreme Court expressly but erroneously declaring *Faretta* to be enhancement of the accuracy of the fact-finding process!); (5) whether defendant's express dissatisfaction with counsel implies an assertion of *Faretta*, and if so, is the "dangers" warning or obverse advisement of the right to proceed *pro se* thereby triggered; (6) whether defendant's demand to participate in trial functions triggers *Faretta* and the knotty problem of "hybrid" and/or lay representation; (7) termination of *pro se* status; (8) prisoner access to legal materials and the shackled defendant in court; (9) the difference if any, between *Faretta* and the waiver of counsel (and proper recordation thereof); (10) harmlessness of the constitutional error; (11) conflicting joint representation by one attorney; (12) *Miranda's* waiver of counsel where prevented by statute; (13) *sua sponte* duty to advise of defendant's right to testify (Wisconsin) . . . right not to testify (California);

(14) personal vs. counsel stipulation to admission of polygraph results; (15) "per se" requirements of attorney consultation before attorney waiver, waiver of appellate/post conviction notice; (16) defendant's handling of weapon in front of Jury; (17) as well as our instant problems of notice of and/or existence of *Faretta* outside the trial or adversary evidentiary context. Fortunately we consider here only the last-mentioned important issues.

This Court has doubtless wisely refrained from imposing federal procedural guidelines for application of *Faretta* to any or all of the aforementioned state uncertainties. Federalism requires that states be allowed room to struggle with *Faretta* at the local level in diverse settings.

However, some substantive *Faretta* implications fall within the Supremacy Clause, disallowing state experimentation where uniform understanding is required. We speak here of substantive *Faretta* principles, not multiform procedure for its application.

In our opinion this Court needs definitively to pronounce the non-existence of *Faretta* at criminal arraignment (especially misdemeanor, where most *pro se* representation occurs, although distinction between felony/misdemeanor in this aspect may be unwise).

"Non-existence" of *Faretta* does not mean that counsel can be forced upon defendant at that stage, a situation highly unlikely but harmless in light of defendant's personal right individually to enter his self-chosen plea (*cf.* Standards Relating to the Defense Function §5.2, Appendix "A" p.17). It simply means that neither the *Faretta* "dangers" warning nor the obverse advisement of the right to proceed *pro se* need be given as part of the necessary pre-arraignment *Boykin* advisements (*cf.* Appendix "A", pp.4-5).

Defining *Faretta* to exist only outside the arraignment context (most pleas of guilty occur at arraignment)

would assure conceptual clarity between *Boykin's* constitutionally required plea of guilty recordation of advisements/ waivers and *Faretta's* constitutionally required "dangers and disadvantages" recordation/finding in the adversary evidentiary hearing/trial context. Confusion over constitutionally required standards of *recordation* is unconscionable. Even without retroactivity hundreds of thousands of state plea-of-guilty convictions (*most* state convictions result from pleas of guilty) are jeopardized so long as colorable constitutional attack is provided by *Faretta*.

In this aspect our instant *Faretta* issues are more momentous than the classical but much fewer *pro se* defendants at trial. See Hanson, J., concurring in *Torres* and California plea statistics, 157 Cal.Rptr at 573-575.

We have discussed (Appendix "A", pp. 18-23) the "negative" formulation of *Faretta's* "dangers" advisement and its latent camouflage and chilling of the obverse right to proceed *pro se*.

"The advice *Faretta* requires that the pro se defendent be given concerns not *waiver* of the right, but its *exercise*. Thus, the requirement is for sufficient advice to support an intelligent waiver of the right to counsel."

Russell v. State (1978) Ind.App.) 378 NW 2d 872 882 n.4, Garrard, P.J., concurring, emphasis added.

This correct statement disentangles *Faretta's* inherently confusing blend of *Faretta* (requiring some Sixth Amendment recordation requirement) with *Gideon* (requiring express recordation of advisements/waivers binding all states by *Boykin* in the plea of guilty context). Since *Faretta's* "dangers" advisement/recordation is merely the negative form of *Gideon's* positive advice and waiver of counsel, it follows that *Faretta* and *Gideon* are functionally equivalent in the *Boykin* plea of guilty context. Therefore, because *Boykin* requires all *Gideon* advisements/waivers to be recorded in the arraignment, plea of guilty context, so likewise does *Boykin*

require *Gideon's* counterpart, *Faretta*, to record express advisements/waivers (the "negative" form of the warning already "positively" articulated by the *Gideon* advice/waiver) in the arraignment, plea of guilty context. This was precisely the erroneous reasoning of *Torres* and its instant progeny, *Austin*.

But the foregoing non-sequitur is latent in *Faretta's* negative ("dangers") formulation of the *Gideon* advisement (advice and waiver of counsel). And totally overlooked by the *Faretta* "negative" formulation of *Gideon* is the possible independent *Boykin* requirement of Sixth Amendment advice/waiver of *Faretta's* substantive right to proceed *pro se*. See Appendix "A", pp. 21-22.

This Court needs to articulate the substantive principle that (1) *Faretta* (and its recordation requirements) have no connection whatever with *Boykin's* plea of guilty recordation requirements; that would resolve the instant case. But additionally this Court should articulate that (2) *Faretta* protects constitutional interests (defendant's personal autonomy)

totally at odds with and unrelated to those of *Gideon* (fairness to defendant) - - one would think the original *Faretta* opinion explicit on this point, but many states still consider *Faretta* to be simply a "waiver of counsel" decision-- (3) that *Faretta* cannot be *Boykinized* to require affirmative advisement/waiver of the *right to proceed pro se* in the plea of guilty context; (4) nor be *Zerbstized* to require such advice/waiver in the non-plea of guilty context (*cf.* Appendix "A", pp. 20-21) that (5) the "actual state of the accused" remains *Gideon*, not *Faretta*, and (6) therefore, no *Faretta* advisement of any kind (neither pro *pro se* nor "dangers") need be given unless and until defendant affirmatively and unequivocally asserts his interest in personal autonomy. (We ignore herein the difficult *Faretta* implications presented when defendant expresses dissatisfaction with defense counsel, seeks to participate personally with counsel, or defendant who expressly seeks co-counsel, hybrid counsel, stand-by counsel, or lay counsel variations on his *pro se* status.)

We disagree here with the Indiana rule requiring at arraignment *both* the advisement of *Gideon's* right to counsel and *Faretta's* right to proceed *pro se*. 378 NW2d at 881. While not technically "contradictory" advisements-- one can assert both simultaneously in the "hybrid" counsel situation [*State v. Edwards* (1979, Mo.App.) 592 SW2d 308, 312]-- nevertheless they conjunctively produce confusion for defendants, who must ordinarily choose between them. Better the California (and majority) practice of advising solely *Gideon* at arraignment.

Presiding Judge Garrard's otherwise well-reasoned analysis is flawed by his erroneous opinion that the "right to self representation is implicit in and a correlative of the right to be represented by counsel" *Id. Faretta* expressly rejected the "correlative existence" theory, rather according the *pro se* right "independent" Sixth Amendment existence. 422 U.S. at 819 n.15, 45 L.Ed.2d at 573 n.15, *cf. Snead v. State* (1976, Md.App.) 406 A.2d 98, 102 n.6. Therefore, Judge Garrard's

conclusion that there is never reversible error for "*mere* failure to expressly advise a defendant of his right to proceed pro se" (378 NE 2d at 881, emphasis original) is probably incorrect.

There was failure expressly to advise of the "right to proceed *pro se*" herein, although it was never assigned as error. However, realizing that "fundamental jurisdictional defects, like constitutional defects, do not become irremediable when a judgment of conviction becomes final, even after affirmance on appeal. . .," *In re Winchester* (1960) 53 Cal.2d 528, 531-532 [2 Cal.Rptr 296, 348 P.2d 904] and contemplating the full retroactivity accorded *Gideon*, and partial retroactivity to the date of *Boykin* in guilty plea convictions, we ought to clarify now this burgeoning constitutional attack which can occur at any time against every post-*Faretta* conviction.

In *People v. Holcomb* (1975) 395 Mich 326 [235 NW2d 343, 347] the Michigan Supreme Court reversed for failure of defendant to "have been adequately

apprised of the nature of the right to proceed *pro se* . . . ."

In *State v. Garcia* (1979) 92 Wash.2d 647 [600 P.2d 1010, 1014] the Washington Supreme Court held that "*Faretta* does not [initially] impose an affirmative duty upon the trial judge to advise a defendant of his right to represent himself. . . ." See also *State v. Fritz* (1978) 21 Wash.App. 354 [585 P.2d 173, 177].

The Oklahoma Court of appeals has declared:

> "[I]f a defendant wishes to proceed pro se it is incumbent upon him to initiate a request therefor and not a duty of the court to advise him of this right."
>
> *Felts v. State* (1978, Okl.Cr.) 588 P.2d 572, 576; *Bowen v. State* (1980, Okl.Cr.) 606 P. 2d 589, 593.

Torres, followed by *Austin* herein, of course, changed the California pre-*Faretta* practice of *not* advising defendants at arraignment of the "dangers" of self-representation nor of the right to proceed *pro se*. Appendix "A", p.21.

There is now a split of authority in California respecting the duty of arraignment courts to advise *Faretta's* "dangers" warning. *cf.* the cases recited by Judge Bigelow, Appendix "D", p.3 California continues to follow pre-*Faretta* policy in refusing to advise initially of the right to proceed *pro se*. *People v. Salazar* (1977) 74 Cal.App.3d 875, 889 [141 Cal. Rptr.753, 761].

We think this latter is good constitutional policy for the nation as a whole. It should be required by the Supremacy Clause to insure *Faretta* does not supplant *Gideon* as the "natural state of the accused." This court cannot tolerate the possibility--clearly arising since the creation of an "independent" Sixth Amendment right to proceed *pro se*-- of the states' choosing *pro se* to be the natural state of the accused, thus destroying all the retroactive fairness *Gideon* has injected into our State criminal justice systems. Better to "chill" *Faretta* than *Gideon*.

Yet *Faretta* "dangers" need never be advised at arraignment. Appendix "A".

CONCLUSION

For the foregoing reasons certiorari should be granted herein.

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D. Order of the Appellate Department of the Superior Court of December 30, 1980, denying certification to any higher California appellate court.

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The Long Beach Prosecutor, on behalf of the State of California, prays that a writ of certiorari issue to review the judgment of the Appellate Department of the Superior Court, Los Angeles County, California, entered October 22, 1979.

OPINIONS BELOW

The opinion of the Appellate Department of the Superior Court, Los Angeles County, California, is unreported. We append it herewith as Appendix A.

The federal constitutional issue to be reviewed was initiated by *People v. Torres* (1979) 96 Cal.App.3d 14 [157 Cal.Rptr. 560] in which we were also counsel of record. Our petitions for rehearing and hearing in the Supreme Court of California were therein denied. We chose not to petition for certiorari in *Torres* because of the technical deficiency in the appellate record wherein the criminal defendant was denied the relief which the instant defendant has gained. Our inadvertent "success" in *Torres* prevented us from seeking further review therein. *Public Service Commission v. Brashear Lines*, 306 U.S. 204, 206; *Gunn v. University Committee*, 399 U.S. 383, 390 n. 5; *Perez v. Ledesma*, 401 U.S. 82, 87 n. 3.

Our instant case has reversed the conviction for failure to give the *Faretta* "dangers and disadvantages" advisement at a pretrial plea of guilty; *Torres* had affirmed its conviction.

JURISDICTION

The judgment of the Appellate Department of the Superior Court, Los Angeles County, California was made and entered October 22, 1979, and a correct copy thereof is appended herein at Appendix A. Our request for certification of the instant decision to the California Court of Appeal was made and denied on November 8, 1979. A correct copy thereof is appended herewith as Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

It has never been the practice of any California court (nor any other state or federal court that we are aware of) to require the giving of the *Faretta* "dangers and disadvantages" advisement to criminal defendants outside of the adversary trial context. In the pretrial, plea of guilty context California requires mandatory advisement of (1) the right to the presence of counsel and/or appointed counsel (hereinafter the "*Gideon* advisement"), (2) jury trial, (3) confrontation of witnesses, and (4) against self-incrimination. These four advisements collectively are called hereinafter the *Boykin-Tahl* advisements, after California's application of *Boykin v. Alabama*, 395 U.S. 238; in *In re Tahl* (1969) 1 Cal.3d 122 [81 Cal.Rptr. 577, 460 P.2d 499]; *In re Birch* (1973) 10 Cal.3d 314, 319, 321 [110 Cal.Rptr. 212, 515 P.2d 12]. Other advisements are also given, *e.g.*, compulsory process, speedy trial, etc., but failure to give them is not deemed reversible constitutional error.

The instant decision has reversed the conviction of a defendant who while unrepresented pleaded guilty at arraignment to a misdemeanor charge, admitting the allegation of a prior conviction (maximum $1000 fine and/or 1 year in jail, minimum 48 hours in jail and $250 fine) of driving a vehicle under the influence of alcohol. [California Vehicle Code §23102(d)]. This reversal was required because of the recent decision of *People v. Torres, supra,* construing the federal *Faretta* Sixth Amendment right to appear *pro se* to extend to the arraignment/plea of guilty as well as the adversary trial context. Therefore, in California all *pro se* pleas of guilty must include in addition to *Boykin Tahl* the *Faretta* "dangers and disadvantages" advisement, indeed, must require that to be the *initial* waiver so that defendant's *pro se* status is thereafter constitutionally "valid" during the defendant's subsequent receipt and waiver of the *Boykin-Tahl* advisements. The questions presented are:

1. Whether the Sixth Amendment's right to proceed *pro se* in the adversary trial context also extends to the pre-trial plea of guilty context.

2. Whether the "dangers and disadvantages" advisement requisite for knowing assertion of *pro se* representation at trial (*Faretta v. California*, 422 U.S. 806, 835) is also required at arraignment in the plea of guilty context. (*Johnson v. Zerbst*, 304 U.S. 276, 298; *Boykin v. Alabama, supra*).

3. Whether federalism is violated by requiring states to adopt specific federally defined procedures and advisements for Sixth Amendment approval of a plea of guilty.

4. Whether *Faretta's* "dangers and disadvantages" advisement can be severed from the adversary trial context to do service pretrial as a Sixth Amendment augmentation to *Boykin-Tahl*.

5. Whether some combination of advisements *other than* the joinder of *Faretta* with *Boykin-Tahl* is constitutionally adequate for a plea of guilty in state

court, *e.g.*, *deletion* of *both* the *Gideon* and *Faretta* advisements.

CONSTITUTIONAL PROVISIONS INVOLVED

Faretta v. California, 422 U.S. 806, 835:

> "When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forego those relinquished benefits. [citations]. Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, *he should be made aware* of the *dangers and disadvantages of self-representation* so that the *record* will establish that 'he knows what he is doing and his choice is made with eyes open.'" (Emphasis added).
>
> "Although not stated in the [Sixth] Amendment in so many words, the right to self-representation -- to make one's own defense personally -- is thus necessarily implied by the structure of the Amendment."

Id. 422 U.S. at 819.

"The prosecution and amici curiae on its behalf paint a picture of fiscal disaster and administrative chaos unless this court adopts an all-encompassing principle to the effect that a trial court is never obligated at arraignment to advise a person accused on any misdemeanor of the hazards of self-representation. . . . Leaving aside the proposition that *controlling case law* emanating from the *United States* and California *Supreme* Courts *mandates rejection* of that position. . . ."

People v. Torres (1979) 96 Cal.App. 3d 14 n.1 [157 Cal. Rptr. 560, 562 n.1], emphasis added.

"A waiver of counsel where the charge is a serious one is knowing and intelligent only if preceded by an admonition that self-representation is perilous. (*People v. Fabricant* (1979) 91 Cal.App.3d 706, 712, 154 Cal.Rptr. 340.)"

Id. 157 Cal.Rptr. at 562-563.

". . . [T]he burden is on the People to show that defendant was '. . . made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice

is made with eyes open." [citation]' (*Faretta v. California* (1975) 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L. Ed.2d 562)"

People v. Fabricant (1979) 91 Cal.App.3d 706, 712 [154 Cal. Rptr. 340, 343].

"The *Faretta* court's acknowledgement of the requirement that a defendant must be possessed of sufficient information concerning the perils of self-representation . . . has not changed the law governing the manner in which the process of intelligent waiver must appear in the record."

People v. Torres, *supra*, 157 Cal.Rptr. at 565.

"The statement on appeal expressly states that appellant [Austin] was not advised of the dangers and disadvantages of self-representation as required by *Faretta v. California* [citation]. The docket does not contradict this. In *People v. Torres* [citation] the Court of Appeal addressed a factual situation closely analogous to the facts of this case.

> . . . After discussing waiver of counsel in municipal courts, the *Torres* opinion goes on to state: 'If, therefore, the record on appeal of the case at bar compelled the conclusion that Torres was *not advised* of the *dangers of self-representation*, reversal of the judgment would be required.' [citation]. We do not reach any other issues."
>
> *People v. Austin*, unpublished slip opinion, p. 2, lines 1-21; emphasis added.

STATEMENT

Our facts are undisputed. Respondent was arrested about midnight on February 9, 1979 and charged that date with driving his automobile under the influence of alcohol. A prior similar conviction occuring November 16, 1978, was also charged.

At his arraignment, February 9, 1979, Respondent was given *en masse* an oral statement of his legal rights by the municipal court judge. Mass courtroom arraignment of misdemeanor arrestees was approved in California by *In re Johnson* (1965) 62 Cal.2d 325, 331-333 [42 Cal.Rptr. 228, 398 P.2d 420].

Among the orally recited rights were the following: right to counsel and appointed counsel, continuance to hire counsel, public defender, speedy trial (statutory time limits), public trial by court or jury, reasonable bail, confrontation and cross-examination of witnesses, to silence, remain off the stand, compulsory process for witnesses (for those pleading guilty the 4 *Boykin-Tahl* rights are repeated), immediate sentencing, sentencing considerations, probation, dismissal after probation.

Each misdemeanor defendant is then individually arraigned and asked if he understood the earlier statement of rights. Those pleading guilty are again (a third time) reminded that such a plea is a waiver of the 4 *Boykin-Tahl* rights. Thereafter each individual plea is taken. Procedures vary somewhat among judges but generally follow the foregoing, which was obtained from Judge Zeiger, the instant arraigning judge, regarding his practice in February, 1979. Court reporters are not customarily used in the Long Beach Municipal

Court; one was not used herein.

Respondent was present in court on February 9, 1979, and heard the foregoing statement of rights. He thereafter chose to plead guilty and admit the veracity of the alleged prior conviction. He was never advised of the "dangers and disadvantages" of representing himself at arraignment. He personally and expressly waived counsel pursuant to the "*Gideon* advisement" as part of his *Boykin-Tahl* waivers.

Prior to sentencing Respondent moved to set aside the plea as constitutionally defective *inter alia* for failure to advise of the "dangers and disadvantages" of self-representation. The trial court denied the motion, and Respondent appealed. The Appellate Department of the Superior Court reversed, declaring itself bound by *Torres* in requiring advisement of *Faretta's* "dangers and disadvantages" warning at arraignment, and declared the instant plea of guilty constitutionally defective. (Appendix A).

Our petition for certification for higher review by the California Court of Appeal was denied, thus rendering the Appellate Department opinion final for all California purposes. (Appendix B).

Recently we obtained temporary stay of enforcement of *Torres* to stop wholesale invalidation of all *pro se* plea of guilty convictions, thousands of which began to be declared unconstitutional as soon as *Torres* became final. The stay exists pending your determination regarding this Petition for Certiorari. Respondent has been out of custody on bail throughout these proceedings.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it (following *Torres*) erroneously interprets both (1) the substance of the *Faretta* Sixth Amendment right and (2) the function of the "dangers and disadvantages" advisement to require said advisement as a constitutional prerequisite for a plea of guilty in a state court.

Thereby is that advisement severed from its constitutional purpose, *i.e.*, to assure voluntary constitutional assertion of the *Faretta pro se* right at trial, and applied in its severed capacity as an unwitting augmentation to the well-settled pronouncements of *Boykin-Tahl* (constitutional advisements and waivers pursuant to a plea of guilty in state court). Not only is that a misreading of *Faretta*, but were the reading correct, it still is *non-sequitur* that states could not be free to tailor their own advisements during the plea of guilty so as to comply with *Faretta without* giving the "dangers and disadvantages" advisement.

1. *Faretta-California, supra,* was never intended to apply in the non-adversary (plea of guilty) context. The *Faretta* right guarantees the constitutional assertion of one's individualism (usually to the detriment of substantial justice) for a defendant in an adversary criminal trial. The "dangers and disadvantages" advisement, as prerequisite to knowing assertion of the *Faretta*

right, protects society's constitutional interest in fairness and defendant's constitutional interest in voluntariness. In the plea of guilty context the interests of fairness (justice) and voluntariness are protected by the *Gideon* advisement as part of the *Boykin-Tahl* waivers.

The *Faretta pro se* right, while fully applying to pretrial adversary evidentiary hearings, cannot apply to arraignment because arraignment is never an adversary evidentiary hearing. Since the substantive *Faretta pro se* right does not exist at arraignment, the "dangers and disadvantages" advisement -- necessary for constitutionally "voluntary" assertion of the substantive *Faretta* right (*Johnson v. Zerbst, supra*) -- likewise does not exist therein.

2. *Faretta* cannot exist at the plea of guilty because it is impossible for a defendant to assert his right to *individualism* (". . . to go to jail under his own banner," Blackmun, J., dissenting, *Faretta, supra,* 422 U.S. at 849) when he has chosen to plead

guilty. *Faretta* is the Sixth Amendment right to carry one's own adversary banner in front of the trier of fact despite the injustice which may result. How can that interest in individualism be asserted in the plea of guilty context, where defendant has chosen to forego the possession of any "banner" at all? By choosing not to contest the charge(s), a defendant cannot have any constitutionally protectable interest in asserting his individualism. The *Gideon* advisement protects defendant's interest in justice/fairness and assures that his waiver of counsel is knowing and voluntary (*Boykin-Tahl*). Having protected defendant's interest in justice/fairness, and no defense interest in personal autonomy being thereafter possible, we never reach the issue of *Faretta*.

We express no opinion as to whether *Boykin v. Alabama, supra,* needs augmenting. We note only that this case does not present that issue. Irrespective of the desirability *vel non* of expanding the *Boykin* advisements, they cannot be expanded (as was done herein) by wholesale

adoption of foreign *Faretta* principles, which were designed to protect wholly different constitutional interests.

3. *Faretta* is not necessary at arraignment to protect defendant's volition in choosing to plead guilty or not guilty, since the plea must be entered by defendant personally irrespective of the presence of counsel. The defendant alone must decide what *plea* to enter, whether to waive jury trial, and whether to testify on his own behalf; all other decisions are "the exclusive province of the lawyer." American Bar Association Project on Criminal Justice, Standards Relating to the Defense Function, § 5.2.

4. If the substantive *Faretta* right and its obligatory "dangers" warning apply to situations outside the adversary evidentiary hearing context, such as arraignment, there is no reasonable limitation by which *Faretta* can be restrained from expanding to "occupy the field" now held by *Gideon*. The *Miranda* warning, *e.g.*, will now have to include a *Faretta* warning in addition

to the *Gideon* advisement. *cf. Stanley v. State* (1977) 240 Ga. 341 [241 S.E.2d. 173, 177].

5. Even if *arguendo* the substantive *pro se* right attaches at arraignment, it does not follow that pre-advisement thereof need be made. The "dangers and disadvantages" advisement is triggered only by *affirmative assertion* of the *pro se* right at an adversary evidentiary hearing, *i.e.*, when defendant appears *pro se* at such a hearing and announces "ready to proceed." Defendant has thereby chosen to assert his *pro se* right (without advisement of the existence of the *pro se* constitutional right), and this triggers the *Faretta* "dangers" warning to make the *pro se* assertion constitutionally "voluntary" (*Johnson v. Zerbst, supra*). But *Faretta* does not require blanket advisement of the "dangers" warning at arraignment because defendant is not "asserting" anything. The *Torres* opinion mistakenly assumes that the *pro se* defendant at arraignment is necessarily "asserting" his waiver of counsel. The *Gideon* advisement

assures that defendant's *appearance pro se* is constitutionally valid, *i.e.*, his waiver of counsel is knowing and voluntary.

Waiving counsel is *not* the same as asserting the *pro se Faretta* right, which thereafter requires the "dangers" warning. A defendant can appear *pro se* totally irrespective of whether he waives counsel. "Standby counsel" protects defendant's *Gideon* interest (counsel/fairness) while defendant simultaneously asserts his *Faretta pro se* right at an adversary evidentiary hearing. (Theoretically no "dangers" warning need be given in "standby" or "advisory" or "hybrid" counsel cases because defendant's interest in fairness is not being sacrificed.) Waiving counsel without asserting defendant's self-interest in individualism, *i.e.*, pleading guilty at arraignment, does not trigger the "dangers" warning because no individualism is being asserted, nor can be.

6. *Torres* erroneously construed the *Faretta* "dangers" warning to be the equivalent of *informing* a defendant of

his *pro se* right (which it clearly does not), which existence-informing function (advisement) is constitutionally required for knowing voluntary waiver of the right (*Johnson v. Zerbst, supra; Boykin v. Alabama, supra*). Perceiving that the *Gideon* advisement and the *Faretta* "dangers" warning protect the identical interest in defendant's justice/fairness, indeed, they are obverse sides of the same coin -- one stating affirmatively the existence of the right to counsel, the other warning negatively against waiver thereof -- and seeing that the *Gideon* advisement is necessary for knowing waiver of counsel, *Torres* mistakenly extended the *Faretta* "dangers" warning, analogous to *Gideon*, for knowing "waiver" of the *Faretta pro se* right. Since the *Gideon* advisement is clearly required by *Boykin-Tahl* in the plea of guilty context, so also, reasoned *Torres*, is the "dangers" warning. But this puts the cart before the (nonexistent) horse. The horse is nonexistent because the substantive *Faretta pro se* right does not exist at arraignment. One need not

be advised of a right which has no existence at the time of the advisement. *cf.* Reasons 1-4 herein. The cart is before it because the *Faretta* "dangers" warning does not advise of the *existence* of the *pro se* right. To the contrary, it advises against assertion of that *pro se* right. An obverse *Faretta* advisement, advising of the *existence* of the *pro se* right -- *not* the "dangers and disadvantages" warning -- has been consistently rejected in California. *cf. People v. Enciso* (1972) 25 Cal.App.3d 49, 57 [101 Cal.Rptr. 590, 594], decided by the same court which decided *Torres*, and *People v. Salazar* (1977) 74 Cal.App.3d 875, 889 [141 Cal. Rptr. 753, 761].

The confusion engendered by *Faretta's Boykin*-like "record" requirement of advisement of the "dangers" warning, without requiring *Zerbst*-like advisement of the existence of the *right to* self-representation (thus vitiating any knowing waiver of the substantive *pro se* right) clearly calls for explanation by this Court. It is easy to misconstrue the *Faretta* "dangers" warning as the equivalent of

Zerbst's existence-informing advisement necessary for waiver thereof, which latter advisement must be contained in the record and specifically articulated pursuant to *Boykin-Tahl* for a valid plea of guilty.

The most difficult issue presented herein is not *Faretta's* "dangers" advisement at arraignment, which is clearly erroneous -- the *Gideon* advisement already performs that function -- but the obverse advisement: the advisement of the constitutional right to forego counsel. Does *Johnson v. Zerbst, supra,* require advisement of the existence of the *pro se* right (not the "dangers" advisement) for there to be valid waiver of the *pro se* right by defendants who exercise their *Gideon* right to counsel? The answer is probably "yes", but it depends upon whether counsel representation, as opposed to self-representation, is the "natural state" of the accused since *Faretta*. *Cf.* Miller, "Faretta v. California: The Law Helps Those Who Help Themselves," 28 *Hast. L.J.* 283, 297-299 (1976) and cases cited therein.

A variation on the federal "optional notice" rule was recently decided in Indiana, requiring advisement of the *pro se* right (not the "dangers" advisement) at arraignment. *Russell v. State* (1978), Ind.App. 378 N.E.2d 872, 881-882, Garrard, P.J., concurring. We suggest the Indiana rule, giving contradictory *Gideon* and *pro se* advisements, to be inferior to the pre-*Torres* California rule, giving only the *Gideon* advisement at arraignment. *Cf.* Reason 7 hereafter.

Clearly, states ought not to be allowed to decide for themselves which is the "natural state" of the accused, *i.e.*, with or without counsel. The Sixth Amendment precludes that. But it does not preclude the states from tailoring their own advisements within the scope of the substantive constitutional rights.

Torres must be reversed by this Court not only because it grossly misconstrued *Faretta*, but so that the states are informed that *Faretta* does not require wholesale renovation of state arraignment procedures at a cost of millions of convictions obtained by *pro se* plea of

guilty. Lacking prospective limitation, *Torres* has now used *Faretta* to render unconstitutional all California convictions entered by way of *pro se* plea of guilty. The slaughter is in the millions. *Cf.* appendices to Justice Hanson's concurring opinion in *Torres*, 157 Cal.Rptr. at 573-575.

On the other hand, states must be instructed that *Faretta* is not merely a super-waiver of counsel, thus allowing them to ignore the giving or recording of the separate "dangers and disadvantages" advisement when a criminal defendant appears *pro se* at a state adversary evidentiary hearing.

> "Illinois has never required that defendant be advised specifically of the dangers and disadvantages of self-representation in addition to the admonitions of Rule 401(a) [waiver of counsel]."
>
> *People v. Black* (1978) 68 Ill.App.3d 309 [385 N.E.2d 899, 903].

Faretta is not modern augmentation to the waiver of counsel; it is the assertion of an independent constitutional

right. The vast majority of state decisions regarding *Faretta* have construed the "dangers" warning as merely adjunct to waiver of counsel, and therefore largely dispensed with it. This needs your immediate correction, as state courts are thereby violating an express provision of *Faretta*, infecting their *pro se* trials with reversible error.

7. Indiana's recent resolution of which combination of constitutional advisements should be given at arraignment (*Russell v. State, supra*) reiterates viable state alternatives in formulating the advisements. *Torres* (and *Austin* herein) erroneously assume that the Sixth Amendment *requires* the *Faretta* "dangers" advisement at arraignment. While *Torres* and its progeny *Austin* are clearly wrong, nevertheless it is probably true that (as with Indiana) some form of advisement of the constitutional right to proceed *pro se* is required. *Johnson v. Zerbst, supra.*

What should be the form of the constitutional advisements at arraignment? Clearly the states should be free to

draft their own combinations of advisements. *Torres* precludes any such state autonomy:

> "If, therefore, the record on appeal of the case at bar compelled the conclusion that Torres was not advised of the dangers of self-representation [at arraignment], reversal of the judgment would be required."
>
> *People v. Torres*, *supra*, 157 Cal. Rptr. at 564.

If this Court decides that counsel representation is no longer (since *Faretta*) the "natural state" of the accused, states should be allowed to refrain from giving the *Gideon* advisement at arraignment. Giving both the *Gideon* and the *pro se* (not the "dangers") advisements would necessarily engender confusion because of the contradictory nature of those advisements. *Cf.* our Petition for Hearing to the California Supreme Court in *Torres*.

Review should be undertaken herein to clarify that states are not precluded from experimenting in their combinations of constitutional advisements at arraignment

but are nevertheless required to give and memorialize for the record the "dangers and disadvantages" advisement for defendants who appear *pro se* at adversary evidentiary hearings.

CONCLUSION

For the foregoing reasons certiorari should be granted herein.

DATED: December 14, 1979

John A. Vander Lans
Robert R. Recknagel
Gerry L. Ensley

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INDEX TO APPENDICES

A. Opinion and Judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles

B. Order Denying Certification

[Those two appendices pertain solely to our earlier petition for certiorari, No. 79-1041]

Filed October 22, 1979

John R. Corcoran, County Clerk

By L. Swart, Deputy

APPELLATE DEPARTMENT OF THE
SUPERIOR COURT OF THE STATE OF
CALIFORNIA FOR THE COUNTY OF LOS ANGELES

People of the State of California,	Superior Court No. CR A 17231
Plaintiff and Respondent,	Municipal Court No. L 66293
vs.	OPINION AND JUDGMENT
Robert Stanley Austin	
Defendant and Appellant.	

Appeal by defendant from judgment of the Municipal Court.

Thomas Zeiger, Judge.

Judgment reversed and cause remanded to trial court with instructions.

For Appellant - Steven M. Shaw

For Respondent - John A. Vander Lans, City Prosecutor; By Gerry L. Ensley, Deputy City Prosecutor

-oOo-

Appellant, without counsel entered a guilty plea to a charge of violating Vehicle Code section 23102, subdivision (a) (driving under the influence). He also admitted having suffered a prior

conviction under the same code section. His claim on appeal is that the court erred in denying his motion to withdraw his guilty plea and his admission of the prior. We agree.

The statement on appeal expressly states that appellant was not advised of the dangers and disadvantages of self-representation as required by *Faretta v. California* [1975] 422 U.S. 806. The docket does not contradict this. In *People v. Torres* [1979] 96 Cal.App.3d 14, the Court of Appeal addressed a factual situation closely analogous to the facts of this case. The Court held that the record there was inadequate to establish appellant's claim that he was not advised in accord with *Faretta*. The docket entries in the two cases are almost identical. The distinguishing feature in this case is that the statement on appeal establishes that the warning was not given whereas in *Torres* the statement on appeal was silent on this issue. *Torres* cites *People v. Fabricant* [1979] 91 Cal.App.3d 706, 712 for the proposi-

tion that, "A waiver of counsel where the charge is a serious one is knowing and intelligent only if preceded by an admonition that self-representation is perilous." (96 Cal.App.3d at p. 18.) After discussing waiver of counsel in municipal courts, the *Torres* opinion goes on to state: "If, therefore, the record on appeal of the case at bar compelled the conclusion that Torres was not advised of the dangers of self-representation, reversal of the judgment would be required." (Id. at p. 20). We do not reach any other issues.

The judgment is reversed and the case is remanded to the trial court with instructions to permit the defendant to withdraw his plea of guilty to the violation of Vehicle Code section 23102, subdivision (a) and to withdraw his admission of the prior conviction under the same statute, and to rearraign him for plea on the original complaint.

Judge Saeta

We concur. Presiding Judge Cole

Judge Dowds

APPENDIX "B"

[For No. 79-1041 only]

Filed November 8, 1979
John R. Corcoran, County Clerk
By L. Swart, Deputy

APPELLATE DEPARTMENT OF THE
SUPERIOR COURT OF THE STATE OF
CALIFORNIA FOR THE COUNTY OF LOS ANGELES

People of the State of California,	Superior Court No. CR A 17231
Plaintiff and Respondent,	Municipal Court No. L 66293
vs.	ORDER DENYING CERTIFICATION
Robert Stanley Austin	
Defendant and Appellant.	

THE COURT *

The petition of defendant [*sic*] for certification of cause to the Court of Appeal in the above-entitled case having been filed and having been duly considered,

Said petition is hereby denied.

---

*Before Cole, P.J., Dowds, J. and Saeta, J.

APPENDIX "B"

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

April 14, 1980

Gerry L. Ensley, Esquire
400 W. Broadway
Suite 207
Long Beach, California 90802

RE: California v. Robert Stanley Austin
Case No. 79-1041

Dear Mr. Ensley:

The Court today entered the following order in the above-entitled case:

"The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Appellate Department, Superior Court of California, County of Los Angeles, to consider whether the judgment is based upon federal or state constitutional grounds, or both."

Very truly yours,

MICHAEL RODAK, JR. Clerk

By

Francis J. Lorson
Deputy Clerk

th

cc: Steven M. Shaw, Esquire

APPENDIX "C"

Filed December 16, 1980
John R. Corcoran, County Clerk
By A.B. Hardey, Deputy

APPELLATE DEPARTMENT OF THE
SUPERIOR COURT OF THE STATE OF
CALIFORNIA FOR THE COUNTY OF LOS ANGELES

People of the State of California,	Superior Court No. CR A 17231
Plaintiff and Respondent,	Municipal Court No. L 66293
vs.	OPINION AND JUDGMENT
Robert Stanley Austin	
Defendant and Appellant.	

The Supreme Court of the United States on April 14, 1980, issued its order and judgment that, "The judgment Appellate Department, Superior Court of California, County of Los Angeles, in this cause is vacated, and that this cause is remanded to the Appellate Department, Superior Court of California, County of Los Angeles, to consider whether its judgment is based on federal or state constitutional grounds, or both." _____ U.S. _____, _____ L.Ed. 2d_____, 100 S.Ct.1640.

Pursuant to this mandate we have re-examined our opinion in this case filed October 22, 1979, and certify our judgment, relying as it does on *Faretta v. California* (1975) 422 U.S. 806; *People v. Torres* (1979) 96 Cal.App.3d 14; and *People v. Fabricant* (1979) 91 Cal.App. 3d 706, is based on both federal and state constitutional grounds. *People v. Torres, supra,* relies heavily on the leading California Supreme Court decision of *In Re Johnson* (1965) right to counsel and the procedures for appointment and waiver of counsel on Article I, section 13 (now Article I, section 15), of the California Constitution. *Faretta v. California, supra,* as we read it, is based on the federal constitutional right to self-representation.

Inasmuch as we deem it unnecessary to alter our prior opinion, we reiterate it in its entirety.

Ibanez

Presiding Judge

I concur.

Saeta

Judge

BIGELOW, J., CONCURRING:

I concur in the new holding that the decision is based on both the federal and state constitutions. I do not concur in the original holding that a defendant must be warned of the hazards of self-representation before being granted pro per status. I would follow the contrary holdings in *People v. Barlow* (1980) 103 Cal.App.3d 351, *People v. Paradise* (1980) 108 Cal.App.3d 364, and *Benge v. Superior Court* (1980) 110 Cal.App.3d 121.

Bigelow

Judge

APPENDIX "D"

Filed December 30, 1980
John R. Corcoran, County Clerk
By A.B. Hardey, Deputy

APPELLATE DEPARTMENT OF THE
SUPERIOR COURT OF THE STATE OF
CALIFORNIA FOR THE COUNTY OF LOS ANGELES

People of the State of California,	Superior Court No. CR A 17231
Plaintiff and Respondent, vs.	Municipal Court No. L 66293
Robert Stanley Austin	ORDER DENYING CERTIFICATION
Defendant and Appellant.	

THE COURT*

The petition of respondent for certification of cause to the Court of Appeal in the above-entitled case having been filed and having been duly considered,

Said petition is hereby denied.

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*Before Ibanez, P.J., and Bigelow, J.